OCT 14 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 597

NATHAN KOPLIN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE OHIO NATIONAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

VIRGIL D. PARISH,
Counsel for Appellee.

BETTINGER, SCHMITT & KREISS,
BUCKINGHAM, DOOLITTLE & BURROUGHS,
Of Counsel.

IN THE SUPREME COURT OF THE STATE OF OHIO

No. 29622

NATHAN KOPLIN, ON BEHALF OF HIMSELF AND ALL OTHER POLICYHOLDERS OF THE OHIO NATIONAL LIFE INSURANCE COMPANY, AN OHIO CORPORATION, SIMILARLY SITUATED,

Appellant,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY

Appellee.

COUNTER-STATEMENT OF APPELLEE AS TO JURISDICTION AND MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT.

Counter-Statement of Appellee as to Jurisdiction

Pursuant to the provisions of Rule 12, Paragraph 3, of the Supreme Court of the United States, appellee files its counter-statement disclosing certain matters and grounds making against the jurisdiction of the Supreme Court of the United States asserted by the appellant.

No Federal Constitutional Question Is Presented by the Record in This Case

Appellant's attack upon the Mutualization Act (Sections 9364-1 to 9364-8 of the Ohio General Code) was twofold,

as stated by the Ohio Supreme Court 143 O. S. 329, pages 339 and 340:

> 1. That the act is void because it delegates legislative power to the Superintendent of Insurance in violation of the *Ohio* Constitution.
>
> 2. That the act is unconstitutional and void because the *operative effect* thereof as applied to the plan of mutualization adopted by appellee results in the impairment of the obligation of Apellants' contract and amounts to the taking of his property without due process of law.

The first did not involve the Constitution of the United States. Indeed the petition of the Appellant specifically limits that claim to a violation of the *State* Constitution (See printed record in Ohio Supreme Court pp. 9 & 17). The Court in holding that there was no delegation of legislative power passed upon a state constitutional question, not a federal constitutional question.

Having disposed of that State question the Supreme Court (on p. 350) stated that the only remaining question was

> "Whether upon the *record as presented* we can say that the obligation of the contracts between the policyholders and the Union Central or Ohio National are impaired, or that the policyholders are deprived of their property without due process of law."
> (Italics ours).

The Court assumed that appellant had presented no claim that the law, per se, was in violation of the federal constitution, and that the only contention presented was that the law was unconstitutional "because of its operative effect upon a particular state of facts."

The Court then concluded that the appellant had not shown a "presently existing state of facts which makes the Act unconstitutional when applied thereto."

The basis for this conclusion is stated by the Court on pp. 351 & 352 as follows:

> "Under the plan in controversy in the Koplin case the shares of stock are to be acquired from time to time as funds are available.
>
> Section 9364-2b specifically provides in part:
>
> '* * * Neither the retirement of its capital stock nor the amendment of its articles of incorporation, as herein provided, shall affect existing suits, rights or contracts of the corporation * * *'
>
> By virtue of the provisions of Section 617, it is the mandatory duty of the superintendent to see that the law relating to insurance, including the above-quoted part of Section 9364-2b, is duly executed and enforced.
>
> We assume that the superintendent will do his full duty, and if that be true, these policyholders will not be deprived of their property without due process of law, nor will the obligation of their contracts be impaired.
>
> In the case of STATE, EX REL. HERBERT v. FERGUSON, AUDITOR, 142 Ohio St., 496, 52 N. E. (2d), 980, this court by a unanimous decision held 'constitutional questions will not be decided *until the necessity for a decision arises on the record before the court.*' "

The claim set forth in the petition and the amendment thereto was that "if said Statute allows the alleged plan of mutualization to be consummated under the terms and conditions set forth in said alleged plan of mutualization and under the circumstances hereinafter alleged said statute is unconstitutional" as being repugnant to the impairment of the obligation of contracts and due process clauses of the United States Constitution.

It is then alleged that under the proposed plan the Appellee was to use the entire capital and surplus and a

part of the policyholders' reserves to purchase the stock, and also that it would take away from the policyholders that part of the capital structure which the policyholders contributed.

Appellee denied all of those averments, and alleged that the plan provided for the purchase of stock *from time to time* as the funds of the Company would permit. This averment necessarily implied that such acquisitions would be subject to all the restrictions contained in the Act, to the approval of the Superintendent of Insurance as required by the Act, and to the general power of the Superintendent under the Insurance Code to safeguard the rights of the policyholders.

Appellant chose to demur, thus admitting the averments in the Answer. He offered no evidence to sustain the above mentioned controverted averments in the petition. Hence there is no proof in the record to support those averments.

With the record in that state the only claim left to the appellant was that the policyholders had a vested right to have the capital stock and surplus held intact forever for their benefit, and that, therefore, the use of any of that capital and surplus to purchase stock under the plan took away their property and impaired their contracts. The Supreme Court on two previous occasions had decided that under the Ohio Statutes the policyholders had no such right. Those holdings were re-affirmed by the Court in the present case. Certainly such a determination of the effect of State laws is solely within the province of the State Court and raises no federal question.

It was upon this record and the established law of Ohio that the Ohio Supreme Court found that there was no showing "of a presently existing state of facts which makes the act unconstitutional and void when applied thereto."

This case did not present a question as to whether appellant's loss of right is within or without the Constitution. The finding is that he has lost no rights. He has shown

neither a loss of property nor impairment of contract. He has offered no facts in support of either. Whether within the terms of the Ohio Mutualization Act such a mutualization might be undertaken as would result in an unconstitutional taking of property or impairment of contract will of necessity await a case in which there is a showing of the taking of property or some impairment of contract right.

For this court at this moment to enter upon a consideration of any constitutional question would be as unwarranted as for a court of last resort in any circumstances to engage in a reconsideration of facts. The facts have been so determined in the Ohio courts as to leave no question under the Constitution.

Hence, it appears that there is here involved no determination with which upon review this court could conceivably differ. To put it othewise there is involved no question, even remotely substantial, arising under the Constitution of the United States.

Motion to Dismiss Appeal or, in the Alternative, to Affirm

Pursuant to Section 12, Paragraph 3, of the Rules of the Supreme Court of the United States, appellee respectfully moves that the appeal be dismissed or, in the alternative, that the judgment be affirmed on the grounds herein set forth in its Counter-statement of Facts as to Jurisdiction.

Respectfully submitted,

VIRGIL D. PARISH,
Counsel for Appellee.

Of Counsel:
BETTINGER, SCHMITT & KREIS,
WALTER SCHMITT;
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